

The Evolving Interpretation of Article 97 *Smith v. Westfield, 478 Mass 49 (2017)*

In Smith v. Westfield, 478 Mass. 49 (2017), the Supreme Judicial Court considered whether Article 97 of the Amendments to the Massachusetts Constitution applied to a parcel of land originally acquired by the city through a tax taking. The Court held that the property was subject to Article 97 because the city, through its actions, clearly expressed its intent to protect the property permanently. This decision expands the Court's previous decision in Mahajan v. Department of Environmental Protection, 464 Mass 604, 615 (2013), and allows municipalities more opportunity to permanently protect land for Article 97 purposes.

By way of background, Article 97, by its express terms, applies to land "taken or acquired" for "conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources". Once land is acquired for an Article 97 purpose, it is permanently protected for that particular purpose unless the General Court votes by a 2/3 vote of each house to remove such protection. In addition to the seminal opinion of the Attorney General on this topic, the Supreme Judicial Court has rendered two important opinions interpreting Article 97. In the first, Hanson v. Lindsay, 444 Mass. 502 (2005), the seminal fact was that town meeting had voted to authorize the conservation commission "to accept for conservation purposes a deed" to property that the town originally acquired through a tax foreclosure (emphasis added). The Court held that such land was not protected by Article 97 where the property was not acquired for an Article 97 purpose and no deed restriction had been recorded in connection with the referenced town meeting vote. In Mahajan, the Court interpreted Article 97 more broadly, holding that Article 97 applies to land not originally acquired or taken for an Article 97 purpose provided that such land was later specifically "designated" for an Article 97 purpose.

The question left undecided in Mahajan, whether Article 97 applies to land that was not acquired for an Article 97 purpose and that was not subject to a recorded restriction, was answered in Westfield. In Westfield, the property at issue, originally acquired by tax taking in 1939, became known as the Cross Street Playground, with two baseball fields and a playground located thereon, and was used by the public for over 60 years in that capacity. The city council placed the property in the custody of the playground commission, passed an ordinance formally recognizing it as a playground, and included the property in its open space plan recognizing it as public land with a "full" degree of protection and "active" recreation potential. Importantly, in 1979, the city received a grant under the federal Land and Water Conservation Fund Act of 1965 (the "Act") to rehabilitate the playground, and signed a contract agreeing to comply with the Act. The purpose of the Act was to assure "outdoor recreation resources" for all persons, and, importantly, mandated that "[n]o property acquired or developed with assistance [under the Act] shall . . . be converted to other than public outdoor recreation uses" without the approval of the United States Secretary of the Interior.

In 2011, the city council transferred the property to the school department for the construction of an elementary school. A group of residents sought to enjoin the construction, claiming the property was protected by Article 97, and therefore that the city was required to obtain approval of the General Court to change the use of the property. The Superior and Appellate Courts held that Article 97 did not apply because the property was not acquired for an Article 97 purpose and was never subject to a recorded restriction. However, the Appeals Court, in its concurrence, urged the Supreme Judicial Court to reconsider the Hanson decision because the plain language of Article 97 does not require a recorded restriction.

Based upon the facts outlined above, the Westfield court concluded that Article 97 applies to the Cross Street Playground because the city's actions exhibited a clear intent to dedicate the land for park and playground purposes in perpetuity. The Court held that the "totality of the circumstances" must be analyzed to determine if the city intended to dedicate the land permanently as a public park and where the public accepts such use by actually using the land as a public park. To the Court, "the determinative factor", or the clearest expression of the city's intent, was the city's acceptance of the provisions of the Act, by which it forfeited its ability to use the property for any use other than outdoor public recreation permanently without the consent of the federal government. The Court held that Article 97 applies to land not originally acquired for an Article purpose where the municipality demonstrates a "clear and unequivocal intent to dedicate the land permanently as a public park and where the public accepts such use by actually using the land as a public park". (Emphasis added).

Post-Westfield Q & A:

- ***Is it necessary to have a recorded restriction to protect land under Article 97?*** No. The Court expressly stated in Westfield that it is not necessary to record a deed or a conservation restriction for land to be protected under Article 97. Nevertheless, a recorded restriction is one of the means by which land may become subject to Article 97.
- ***What factors should be examined to determine clear and unequivocal intent to permanently dedicate land under Article 97?*** While the Court in Westfield stated that the city's acceptance of a federal grant was the most significant evidence of its intent to permanently dedicate land, other actions could also demonstrate such intent, including votes of the local legislative body, use of such land by the public, appropriation of funds for the particular Article 97 purpose, and conditions associated with any state or federal grant funding, if applicable.
- ***Is recreational land subject to Article 97?*** There are no appellate-level cases directly addressing whether land acquired for or dedicated to recreational purposes is subject to the provisions of Article 97. The Court could have opined on this issue in Westfield, since the property at issue is described as including two little league baseball fields and a playground. However, since the city "did not challenge the plaintiff's assertion that the use of the Cross Street Playground fell within the range of environmental purposes contemplated by art. 97", the Court did not address this question directly. It remains possible that an appellate level court will find that recreation land is protected under Article 97.

- **How can a municipality ensure that land is subject to Article 97?** The answer to this question depends on how the land was acquired.

Original Acquisition: A municipality can dedicate property to one or more Article 97 purposes when it originally acquires the land. First, the legislative body must authorize the acquisition for an expressly-stated Article 97 purpose, and in conjunction therewith dedicate the land to be used permanently for that purpose. Second, we recommend that the vote of the legislative body be recorded with the appropriate registry of deeds. In addition, or alternatively, a formal “Acceptance of Deed” may be recorded with the deed or other recordable instrument, signed by the appropriate municipal entity and specifically reciting that the property is being accepted for that particular Article 97 purpose.

Later Dedication: In circumstances where a municipality wishes to dedicate property it already owns to one or more Article 97 purposes, it may take the following actions, among others, to exhibit its intent to permanently protect the property. First, the local legislative body should vote to dedicate the property to the particular Article 97 purpose in perpetuity. If the property is held for a different specific purpose, the legislative body must also transfer custody of the land to an appropriate board or officer for such purpose. If the land is already being used for the particular Article 97 purpose to which it is dedicated, no further action need be taken. If not, a municipality may wish to take additional action to demonstrate its intent with respect to the property, as appropriate, including but not limited to, erecting or affixing signs stating that the property is dedicated to a particular Article 97 purpose, including the property in its open space plan, including the property in the list of properties held under the jurisdiction of a particular board or commission, and/or allowing public use of the property for the stated Article 97 purpose.

If you have any further questions concerning the Westfield case, or Article 97 generally, please contact Attorneys Shirin Everett (severett@k-plaw.com) or Katharine L. Klein (kklein@k-plaw.com), at 617-556-0007.

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